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No. 02-58

IN THE

Supreme Court of the United States

EASTERN PILOTS MERGER COMMITTEE,
Petitioner,

v.

CONTINENTAL AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE ALLIED PILOTS ASSOCIATION IN SUPPORT OF PETITIONER

DAVID PALMER DEAN *
JESSICA RACHEL ARONS
JAMES & HOFFMAN, P.C.
1101 17th Street, N.W.
Washington, D.C. 20036
(202) 496-0500

* Counsel of Record

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE ALLIED PILOTS ASSOCIATION

The Allied Pilots Association ("APA") is the collective bargaining representative for 12,000 pilots at American Airlines, Inc. ("AA"), the largest airline in the world. APA moves for leave to file the attached brief *amicus curiae* in support of the Petition for *Certiorari*. Petitioner granted consent. Respondent's counsel refused APA's request for consent.

APA views the issues in this case from the perspective of a labor organization with ongoing obligations under the Railway Labor Act ("RLA") to negotiate successorship rights and remedies for its pilots, and the further obligation to resolve disputes over the interpretation and application of its labor agreement through the adjustment board process mandated by

the RLA. In addition, AA pilots now include 2,000 pilots who formerly flew for Trans World Airlines, Inc. ("TWA"). Those pilots participated in section 1113 procedures under the Bankruptcy Code before AA purchased TWA's assets out of bankruptcy in April 2001.

APA shares petitioner's concern: the panel decision below grants airline management the same relief from collectively bargained obligations that management should have achieved, if at all, through the procedure for rejecting collective bargaining agreements prescribed in section 1113. The decision thus effectively negates both procedural and substantive employee protections mandated by the Bankruptcy Code, in favor of *ad hoc* inquiry by a bankruptcy court.

The panel decision also, however, in remarkably clear terms, infringes upon the exclusive jurisdiction of RLA adjustment boards to decide disputes growing "out of the interpretation or application" of labor agreements, including the jurisdiction to determine contractual remedies. 45 U.S.C. § 184. The panel decision thereby violates this Court's rulings in *Hawaiian Airlines v. Norris*, 512 U.S. 246, 252-53 (1994), and *Consolidated Rail v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 303 (1989) ("*Conrail*"). Both cases clearly mandate primary and exclusive adjustment board jurisdiction over the interpretation of disputed contractual terms. Inadvertently or not, the panel decision opens the doors of federal courts to issues of contract interpretation formerly reserved for adjustment boards.

Because the airline industry faces unprecedented financial instability in the wake of September 11, 2001, including the potential bankruptcy of several carriers that AA may be interested in buying; because APA is currently negotiating a new labor agreement with AA, including expanded successorship rights; because AA, a Delaware corporation, is based in Dallas and thus peculiarly subject to the circuit split over bankruptcy law identified in the Petition for *Certiorari*; and

because the appropriate jurisdiction of RLA adjustment boards is a continual concern, and repeated subject of litigation, for APA and its pilots,[1] the APA asserts an interest in this proceeding and urges this Court to grant APA's motion for leave to file this brief *amicus curiae*.

Respectfully submitted,

DAVID PALMER DEAN *
JESSICA RACHEL ARONS
JAMES & HOFFMAN, P.C.
1101 17th Street, N.W.
Washington, D.C. 20036
(202) 496-0500

* Counsel of Record

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[1] *See, e.g., Whitaker v. Am. Airlines*, 285 F.3d 940 (11th Cir. 2002) (challenged discharge of probationary employee not a minor dispute); *Veta v. Am. Airlines*, No. 95-56299, 1997 U.S. App. LEXIS 4049 (9th Cir. Feb. 3, 1997) (challenged discharge of acquired airline's employee a minor dispute); *Anderson v. Am. Airlines*, 2 F.3d 590 (5th Cir. 1993) (allegation of retaliation for filing state workers' compensation claim not a minor dispute); *Renneisen v. Am. Airlines*, 990 F.2d 918 (7th Cir. 1993) (challenge to contract's validity not a minor dispute); *Davies v. Am. Airlines*, 971 F.2d 463 (10th Cir. 1992) (state law wrongful termination claim not a minor dispute); *Chandler v. Am. Airlines*, No. 91-5079, 1992 U.S. App. LEXIS 6796 (10th Cir. Apr. 10, 1992) (claimed breach of collective bargaining agreement a minor dispute); *Allied Pilots Ass'n v. Am. Airlines*, 898 F.2d 462 (5th Cir. 1990) (alcohol testing policy subject to mandatory arbitration because minor dispute).

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BRIEF *AMICUS CURIAE* OF THE ALLIED PILOTS ASSOCIATION IN SUPPORT OF PETITIONER

The Allied Pilots Association ("APA") files this brief *amicus curiae* contingent on the Court granting the above motion.[1]

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[1] The APA General Counsel's office authored this brief *amicus curiae* in whole. The Eastern Pilots Merger Committee ("EPMC") contributed funds toward APA's attorney fees and expenses. In addition, APA counsel provided advice to the EPMC on its Petition for *Certiorari*.

SUMMARY OF ARGUMENT

The panel decision below ("*Continental II*") found that an earlier panel's decision in the same case ("*Continental I*")[2] had "interpreted" a collective bargaining agreement ("Agreement") between Eastern Air Lines, Inc. and the Air Line Pilots Association ("ALPA") to construe "the seniority provisions of the Agreement as a basis of providing a right of payment in lieu of injunctive relief after considering a variety of factors to include feasibility." Appendix to the Petition for *Certiorari* ("Pet. App.") 6a-7a. Based on the foregoing rationale, *Continental II* declined to reconsider the earlier panel's holding that the pilots' rights to seniority integration constituted "claims" under section 101(5) of the Bankruptcy Code, 11 U.S.C. § 101(5).

Continental II conflicts with well established precedents of this Court. Those precedents mandate exclusive adjustment board jurisdiction over disputed terms of labor agreements in industries covered by the Railway Labor Act ("RLA")—disputes growing "out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." *Hawaiian Airlines v. Norris*, 512 U.S. 246, 252-53 (1994); *Consol. Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299, 303 (1989) ("*Conrail*"). *Continental II* erroneously approved court, rather than adjustment board, resolution of disputed remedial terms of the Agreement.

Correcting this error in *Continental II* would require more than adopting the rationale previously set forth in *Continental I* to maintain the same result. Unlike *Continental II*, *Continental I* correctly stated this Court's holding in *Conrail*, and disclaimed any need to interpret the Agreement. But *Continental I* then misapplied the RLA by ignoring the

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[2] *Continental I* was reported as *In re Continental Airlines, Inc.*, 125 F.3d 120 (3d Cir. 1997). *Continental II* was reported as *In re Continental Airlines, Inc.*, 279 F.3d 226 (3rd Cir. 2002)

limitations on a court's power to set aside adjustment board awards prescribed in 45 U.S.C. § 153, First (p) and (q). Rather, *Continental I* found, prospectively, that "any" adjustment board award based on the pilots' seniority rights would give rise to a right of payment. *Continental I* thus effectively set aside any award of specific performance, even if based on an otherwise valid adjustment board determination that the parties had contracted exclusively for specific performance. Accordingly, neither *Continental I* nor *Continental II* is viable. While *Continental I*'s misapplication of the RLA to the facts did not warrant this Court's review, *Continental II*'s direct violation of this Court's precedents requires reversal, and a consequent reconsideration of the result in *Continental I*.

The errors in both *Continental I & II* flow from the panels' erroneous resolution of the issue identified in the Petition for *Certiorari*. The panels below did not require rejection of the Agreement, but sought to set aside or interpret away any right to specific performance that might arise from the Agreement. But the RLA, as construed by this Court, permits lower courts neither to interpret disputed contract terms nor to set aside adjustment board awards except on the narrow bases prescribed in that Act. Absent rejection, the contract must be given effect through the adjustment board mechanism.

By creating a circuit split over bankruptcy law, and violating this Court's precedents on the appropriate role of courts in interpreting labor agreements under the RLA, the panel decision undermines current collective bargaining in the airline industry. The panel decision creates uncertainty over the enforceability of successorship rights and seniority integration just as many carriers and their employees must adjust, and negotiate responses, to the financial instability in the industry following September 11, 2001. Increased instability in airline labor relations at this time is clearly an issue of national import.

Because *Continental II* conflicts with this Court's established precedents, creates a circuit split over bankruptcy law, and concerns issues of vital national importance, EPMC's Petition for *Certiorari* should be granted.

ARGUMENT

The APA joins Petitioner in respectfully urging this Court to review the judgment below for the reason set forth in the Petition for *Certiorari*: to resolve a circuit conflict over the effect of an employer's failure to reject a collective bargaining agreement under section 1113 of the Bankruptcy Code. The APA writes separately, however, to emphasize that the panel's effective nullification of section 1113 also led the panel to violate this Court's well established precedents under the RLA.

In light of the financial difficulties in the airline industry precipitated by the events of September 11, 2001, the conflicts created by the panel decision assume particular national import. The decision undermines the effect of collectively bargained successorship and seniority integration clauses in bankruptcy just as several large employee groups, including the APA, are seeking to reach new contracts in the wake of September 11. By forcing unions to seek new and expanded protections against the negative effects of mergers, the panel decision contributes to already volatile labor relations in the airline industry.

I. BY RE-AFFIRMING *CONTINENTAL I* BASED ON THAT PANEL'S INTERPRETATION OF DISPUTED REMEDIAL TERMS IN A LABOR AGREEMENT, THE PANEL BELOW VIOLATED WELL ESTABLISHED PRECEDENTS OF THIS COURT

A. Under the Railway Labor Act, interpretive disputes over labor agreements are subject to exclusive adjustment board jurisdiction, and resulting awards may be set aside only on statutorily prescribed grounds

The RLA establishes a comprehensive framework for resolving labor disputes in the rail and airline industries. Pursuant to that scheme, the statute divides contractual disputes into two classes. The first class concerns disputes over the creation of new collective bargaining agreements or attempts to change the terms of existing agreements. Adopting language traditionally used in the rail industry, this Court has termed such disputes "major disputes." *Norris*, 512 U.S. at 252; *Conrail*, 491 U.S. at 302-03; *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945). Major disputes are subject to a lengthy process of bargaining and mediation, and failing agreement, parties may resort to economic force. *Conrail*, 491 U.S. at 302-03.

In contrast, the RLA establishes a "mandatory arbitral mechanism to handle disputes 'growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.'" *Norris*, 512 U.S. at 248 (citing 45 U.S.C. § 153, First (i)).[3]

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[3] Enacted in 1926, the RLA was extended to the airline industry in 1936. *See* 45 U.S.C. §§ 181-88. Although § 201 of the RLA, 45 U.S.C. § 181, extends all provisions of the RLA to the airlines save 45 U.S.C. § 153, "congressional intent requires identical court treatment of airline board decisions under section 184 and railroad board decisions under section 153, and this has been the continuing policy of the courts." *Hunt*

In the airline industry, the Act mandates that carriers and employee representatives establish "boards of adjustment" to arbitrate such disputes. 45 U.S.C. § 184. This Court termed such disputes "minor disputes." *Elgin*, 325 U.S. at 723 ("minor disputes" relate, *inter alia*, "to the meaning or proper application of a particular provision with reference to a specific situation").

Adjustment board jurisdiction to resolve minor disputes is compulsory, binding and exclusive. *Conrail*, 491 U.S. at 303-04 & n.4; *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 322-25 (1972) ("the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law"). The reasons for this rule are well established and have been articulated repeatedly by this Court.[4] First, of course, the statute demands it. 491 U.S. at 303-04 & n.4; 406 U.S. at 322-25. But in addition, this Court has recognized the special competence of industry arbitrators to resolve such disputes based on custom and practice in the industry—and in particular to formulate remedies:

> The federal policy of settling labor disputes by arbitration would be undermined if courts had the final

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v. Northwest Airlines, 600 F.2d 176, 178 (8th Cir. 1979); *see also Loveless v. E. Airlines*, 681 F.2d 1272, 1275 (11th Cir. 1982) ("A court may overturn the decision of an airline system adjustment board only on the basis of one of the grounds listed in 45 U.S.C. § 153, First (q)"); *see generally Norris*, 512 U.S. 246 (1994).

[4] One reason that appears central to this Court's supervisory responsibilities is important but rarely mentioned. Opening the doors of federal courts to RLA contract interpretation issues would likely inundate the lower courts with such cases. In the railroad industry alone, the National Mediation Board reports 6,643 currently pending cases before government-funded adjustment boards as of July 26, 2002. *See* "Weekly Activity Report," National Mediation Board website, *http://www.nmb.gov/activ-rpts/odarch.html* (last visited Aug. 6, 2002).

> say on the merits of the awards. . . . [T]he arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.
>
> * * * *
>
> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations.

United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596-97 (1960).

There can be no question that the exclusive jurisdiction of RLA adjustment boards extends not just to the substantive rights under a labor agreement, but to nonfrivolous disputes over agreed remedies for violation of those rights as well. A core holding of *Conrail* was that the burden on the party seeking to invoke adjustment board jurisdiction is "light." If the party "asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement. Where, in contrast, the [party's] claims are frivolous or obviously insubstantial, the dispute is major." *Conrail*, 491 U.S. at 307. By making a nonfrivolous assertion of right to a particular remedy under a labor agreement, a party meets its burden to vest the adjustment board with jurisdiction to decide that issue.

Thus, for instance, in *General Committee of Adjustment v. CSX Railroad.*, 893 F.2d 584 (3d Cir. 1990), where a railroad sought to sell a line without bargaining over its effects, the

court dismissed a union complaint seeking to enjoin the sale by noting that "[t]he merits of [the] issue [of the impact on union jobs] will be before the Adjustment Board as will the question of what remedy may be appropriate if it decides for the Union." *Id.* at 592. Citing *Conrail*, the court declined to retain jurisdiction pending arbitration, noting that "[i]n minor disputes, the Board has full authority to resolve the matter and can grant a complete and adequate remedy to the prevailing party." *Id.* at 593.[5]

Buttressing the exclusive jurisdiction of adjustment boards to decide interpretive disputes in the first instance, judicial review of adjustment board decisions is "among the narrowest known to the law." *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 91, 93 (1979) (quoting the circuit court below, and noting that "[w]e have time and again emphasized" that the statutory language specifying three "limited" and "specific" grounds for review "means just what it says").

RLA subsections 3, First (p) and (q) permit federal courts to set aside adjustment board decisions on only three bases: (1) failure of the Adjustment Board to comply with the requirements of the RLA; (2) failure of the Adjustment Board to conform or confine itself to matters within the scope of its jurisdiction; or (3) fraud or corruption. 45 U.S.C. § 153, First (p) & (q).[6]

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[5] *See also Air Line Pilots Ass'n v. E. Airlines*, 632 F.2d 1321, 1323 (5th Cir. 1980) ("The Supreme Court has recognized the need for flexibility in the formulation of arbitration remedies. As long as the award is essentially drawn from the essence of the agreement, it is valid and effectively etched in stone").

[6] In addition, some courts have reviewed adjustment board awards on due process or public policy grounds. *See, e.g., English v. Burlington N. R.R.*, 18 F.3d 741 (9th Cir. 1994) (due process); *Union Pac. R.R. v. United Transp. Union*, 3 F.3d 255 (8th Cir. 1993) (public policy). This Court has not yet spoken on these additional bases.

Nor may a party circumvent the remedial powers of an adjustment board through methods of review outside the RLA. *Bhd. of Locomotive Eng'rs v. Louisville & Nashville R.R.*, 373 U.S. 33, 38-39 (1963) ("*BLE*"). In *BLE*, the National Railroad Adjustment Board refused the parties' request to clarify the scope of a remedial award mandating "pay for time lost as the rule is construed on the property." *Id.* at 34. The carrier sued for injunctive relief when the union threatened a strike to enforce its interpretation of the disputed term. This Court affirmed the lower courts' judgment that the union was limited to the judicial enforcement procedure established in § 3, First (p) of the RLA, 45 U.S.C. § 153, First (p), and could not strike to enforce its interpretation. *Id.* at 35-36. The Court based its holding on the principle that "the process of decision through the Adjustment Board cannot be challenged collaterally by methods of review not provided for in the statute." *Id.* at 38.

B. Whereas *Continental I* misapplied a properly stated rule of law, *Continental II* directly conflicts with this Court's prior decisions and should be reversed

Continental I & II both concern, in central part, how Eastern pilots' rights to seniority integration were treated in the bankruptcy court. Whether those rights constituted bankruptcy "claims" under the Bankruptcy Code depends on whether they gave rise to a "right of payment." 11 U.S.C. § 101(5). *Continental I* analyzed this Court's and its own precedents construing § 101(5) and concluded that the "right to payment" is "essentially, an obligation to pay money." Pet. App. 74a-77a (citing *Ohio v. Kovacs*, 469 U.S. 274 (1985); *In re Torwico Elecs.*, 8 F.3d 146 (3d Cir. 1993)). To decide whether the pilots' claim constituted a bankruptcy claim, the *Continental I* court concluded, "the issue we must decide is whether monetary payment is an alternative for the equitable remedy of seniority integration." Pet. App. 77a.

The *Continental I* panel found that monetary payments were an alternative remedy to seniority integration, but appeared to disclaim any need to interpret the Agreement to resolve this issue, asserting it was merely deciding how the pilots' claims under the Agreement would be "treated" in bankruptcy after an arbitral award was rendered:

> We take care to note the boundaries of our holding. It is not our purpose to suggest the award the arbitrator should grant, if an award is warranted upon disposition of the LPP [Labor Protective Provisions] dispute. Our holding is limited to how the claims should be treated in bankruptcy. Simply put, we hold that any claim based on an award of seniority integration arising out of the resolution of the LPP dispute will be treated as a claim in bankruptcy giving rise to a right of payment.

Pet. App. 83a.

The *Continental II* panel, however, insisted that the first panel had looked to the labor agreement to resolve this central issue, by interpreting the seniority provisions of that Agreement:

> In *Continental I*, this court, as did the bankruptcy court and the district court, did not reject the Agreement. *We interpreted it.* We construed the seniority provisions of the Agreement as a basis of providing a right of payment in lieu of injunctive relief after considering a variety of factors to include feasibility.

Pet. App. 6a-7a (emphasis supplied).

Turning first, briefly, to *Continental I*, we show below that if an award were rendered for specific performance, based on a finding that the parties had agreed to specific performance, the court would not be free to set the awarded remedy aside, as the *Continental I* court effectively did, except on narrow

statutory grounds not present here. In turn, we show that whether the remedial terms of the Agreement's seniority integration provisions themselves gave rise to a right of payment, as asserted in *Continental II*, is clearly a contested and nonfrivolous issue. As such, it is one over which an arbitrator would have exclusive jurisdiction and over which an arbitrator had already asserted jurisdiction pursuant to clear language in the parties' Agreement. Whereas the *Continental I* court erred, *sub silencio*, by failing to account for, or misapplying, the RLA's explicit strictures on court review of adjustment board awards, the *Continental II* court expressly trenched on adjustment board jurisdiction and the relevant precedents of this Court.

1. *Background*

In February 1986, in anticipation of a "possible sale or bankruptcy" of Eastern Air Lines, Eastern and its pilots entered into a labor agreement to slash labor costs and provide successorship labor protection for pilots. Pet. App. 217a-20a (*Decision Eastern Air Lines Pilots System Board of Adjustment (Elkouri)*, ALPA Case No. 1-86, dated Sept. 22, 1989). An Eastern adjustment board ("System Board") found that this Agreement incorporated a subset of the LPPs first drafted by the Civil Aeronautics Board in *Allegheny-Mohawk Merger*, 59 CAB 22, 45-49 (1972), specifically sections 2a, 3 and 13 of these standard LPPs. Pet. App. 250a. The provisions grant, in relevant part, a right to fair and equitable seniority integration in the event of a merger and refer "any dispute" over that integration to "final and binding" arbitration:

> Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, *provisions shall be made for the integration of seniority lists in a fair and equitable manner*, including, where applicable, agreement through collective bargaining between the

carriers and the representatives of the employees affected. *In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.*

* * * *

Section 13(a). *In the event that any dispute or controversy . . . arises with respect to the protections provided herein,* which cannot be settled by the parties within 20 days after the controversy arises, *it may be referred by any party to an arbitrator* selected from a panel of seven names furnished by the National Mediation Board for consideration and determination. The parties shall select the arbitrator from such panel by alternatively striking names until only one remains, and he shall serve as arbitrator. Expedited hearings and decisions will be expected, and a decision shall be rendered within 90 days after the controversy arises, unless an extension of time is mutually agreeable to all parties. The salary and expenses of the arbitrator shall be borne equally by the carrier and (i) the organization or organizations representing the employee or employees or (ii) if unrepresented, the employee or employees or group or groups of employees. *The decision of the arbitrator shall be final and binding on the parties.*

(b) The above condition shall not apply if the parties by mutual agreement determine that an alternative method for dispute settlement or an alternative procedure for selection of an arbitrator is appropriate in their particular dispute. *No party shall be excused from complying with the above condition by reason of having suggested an alternative method or procedure, unless and until that alternative method or procedure shall have been agreed to by all the parties.*

Pet. App. 245a-46a (emphasis supplied).

Although other provisions of the *Allegheny-Mohawk* LPPs provide a right of payment to affected pilots in the event of a merger, the System Board found that the Agreement included none of these rights to pecuniary allowances. Pet. App. 244a-45a. After reviewing the negotiating history, the Board rejected carrier arguments to undercut the equitable right to seniority integration, asserting its view that "the Board should not issue any award in this case which is not definitely intended and calculated to recognize meaningful LPP protection for pilots as a matter of contractual right." Pet. App. 247a. As the Board had noted earlier, "even without the pecuniary allowances . . . the protection of seniority itself by application of sections 3 and 13 is of such critical importance that this without more does constitute meaningful protection under the February 23 Agreement. . . . Sections 3 and 13 are the 'heart' of the Allegheny-Mohawk LPP's 'because they control seniority.'" *Id.* at 245a (adopting testimony).

After Continental's parent corporation acquired Eastern in 1986, the parties disputed various aspects of the LPPs, including whether a "merger" between Continental and Eastern had occurred. ALPA initiated the dispute resolution process provided for in the Agreement. After filing for bankruptcy, both carriers attempted to avoid arbitrating the dispute by appealing to § 362 of the Bankruptcy Code. 11 U.S.C. § 362. Those attempts ultimately failed. *See In re Ionosphere Clubs, Inc.*, 114 B.R. 379, 381 (Bankr. S.D.N.Y. 1989), *aff'd*, 922 F.2d 984 (2d Cir. 1990); *Continental I*, Pet. App. 87a. The parties proceeded to arbitration under section 13 of the LPPs before Arbitrator Richard Kasher, who concluded that he had jurisdiction both to determine if a merger had occurred, and if so, to fashion the proper remedies. Pet. App. 94a-95a.

Meanwhile, to safeguard its interests, ALPA filed proofs of claim in the Continental bankruptcy proceeding, asserting, *inter alia*, the pilots' equitable rights to seniority integration

and also seeking money damages for the time period after merger and before seniority integration was achieved. Pet. App. 93a-94a. In response, Continental filed an adversary proceeding, seeking a declaration that, at best, all of ALPA's claims were "general, dischargeable, pre-petition, unsecured claims" compensable with monetary damages. The clear predicate to Continental's position, under the Bankruptcy Code, was that a breach of the equitable right to seniority integration under the Agreement gave rise to a "right of payment." 11 U.S.C. § 101(5).

2. Continental I

As noted above, the *Continental I* panel identified as a core issue in bankruptcy whether the right to seniority integration under the LPPs gave rise to a right of monetary payment. Pet. App. 53a. The *Continental I* panel noted the "tension between bankruptcy law and labor law," and was careful to disclaim any bankruptcy court jurisdiction over the "disposition of the merits of the underlying LPP dispute." Pet. App. 52a, 69a. Rather, the panel cited to this Court's holdings in *Conrail* and *Elgin*, and noted specifically that the courts could not decide "what remedy is appropriate if the agreement is interpreted to require recovery of a remedy" (citing *Gen. Comm. of Adjustment,* 893 F.2d at 592-93). Pet. App. 68a-69a. Moreover, the panel recognized that Continental's failure to reject the Agreement under § 1113 meant that Continental's duty to arbitrate the disputed LPP provisions remained intact. Pet. App. 87a.

Having properly stated much of the relevant law, the *Continental I* panel proceeded to misapply it. The panel framed the issue, in essence, as whether an adjustment board award for seniority integration, once rendered, might be enforceable by money damages. But rather than turn to the RLA provisions pertinent to enforcement of board awards, the panel examined a number of cases, *none of which were*

RLA cases. Ignoring § 153, First (p) and (q), the panel concluded that the courts had previously enforced monetary awards as an alternative to the equitable remedy of reinstatement. Pet. App. 78a-81a. The panel principally relied on one Ninth Circuit case in which that court *upheld* an arbitral award for money damages in lieu of seniority integration. The Ninth Circuit court based its decision on the arbitrator's finding that the labor agreement at issue not only permitted such a remedy, but arguably required it, since an award of seniority integration would exceed the arbitrator's jurisdiction under a contract term that prohibited him from deciding any jurisdictional dispute with another union. Pet. App. 79a. Little wonder, then, that the *Continental II* panel believed that the *Continental I* panel had also based its decision on an interpretation of the Agreement.

Clearly, none of these precedents cited in *Continental I* support setting aside an adjustment board award of specific performance under the RLA, if based on an arbitral finding that the parties had agreed to such an award as an exclusive remedy. The non-RLA cases shed no light on the appropriate treatment of awards under § 153, First (p) and (q). The Ninth Circuit case cannot support setting aside an arbitral award, if based on the same sort of arbitral interpretation to which that court deferred. As shown above, the sole grounds for setting aside such an award are spelled out in § 153, which the panel entirely failed to address.[7]

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[7] The panel attempted to buttress its holding by reference to the language of the Agreement, and by reference to its own conclusion, based, apparently, only on some general sense of the panel that "the particular circumstances of this case might make the enforcement of the equitable remedy of seniority integration impractical," citing "employee morale" and the effect on "employer-employee relations." Pet. App. 78a n.10, 82a-83a. The panel's additional rationales fail, however, for at least three reasons. First, the panel had already recognized that the adjustment board had exclusive jurisdiction to interpret the remedial terms of the

3. Continental II

Clearly, the contractual question on which the *Continental II* panel focused—whether the parties intended to provide for a right of payment concurrent with or in lieu of seniority integration—is a classic interpretive dispute over contractual terms. As shown above, under the RLA, such disputes are committed to the exclusive jurisdiction of adjustment boards. The basic negotiating history for the provisions is spelled out in the System Board opinion that found that the parties had agreed to "meaningful protection" in the form of LPPs, Pet. App. 242a, and by the Eleventh Circuit Court of Appeals opinion that found the existence of a labor agreement between ALPA and Eastern. *E. Air Lines v. Air Line Pilots Ass'n*, 130 L.R.R.M. (BNA) 2284, 2291 (11th Cir. 1988). Whether ALPA knowingly traded away millions of dollars in wage and work rule concessions on the verge of Eastern's sale or bankruptcy, in return for an unsecured right to front pay ultimately dischargeable in bankruptcy, is a question of fact and intent that the RLA wisely commits to arbitral jurisdiction. Clearly the Petitioners have a nonfrivolous argument that ALPA could not conceivably have intended such a trade.

Moreover, the dispute over whether the provisions include a right to payment in lieu of specific performance is a "dispute . . . with respect to the protections" provided by the

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Agreement. Pet. App. 68a-69a. Second, the principal language on which the panel relied was never part of the Agreement. *See* Pet. App. 78a n.10 (citing "section 1" of the LPPs); Pet. App. 250a-51a (adjustment board finding that the Agreement incorporated only sections 2(a), 3 and 13, and possibly 2(d) of the LPPs). Third, the effect and manner of seniority integration is precisely the kind of question best left to an arbitrator schooled in the industry and the detailed custom and practices of the particular "shop," and not to the unsupported reflections of appellate judges. *See Enterprise Wheel & Car Corp.*, 363 U.S. at 596-97.

LPPs that the parties themselves expressly agreed to submit to final and binding arbitration. *See supra* pages 11&12.

The errors in both *Continental I & II* flow from the same source. That source is the panels' erroneous resolution of the issue identified in the Petition for *Certiorari*: the effect of the carrier's failure to proceed under section 1113. Continental Airlines did not reject the Agreement, yet sought to reduce seniority rights under the Agreement to bankruptcy claims, dischargeable in the bankruptcy proceeding. Petition for *Certiorari* at i. Rather than require Continental to follow the procedures of section 1113 to avoid the obligations of the Agreement, the panels purported to set aside or interpret away any right to specific performance that might arise from the Agreement. As shown above, this Court has construed the RLA to prohibit such court interference with the interpretation or enforcement of labor agreements. Absent rejection, the contract must be given effect through the RLA's adjustment board mechanism.

II. *CONTINENTAL II* CREATES UNCERTAINTY OVER MATTERS THAT ARE CURRENTLY VITAL TO NATIONAL BARGAINING IN THE AIRLINE INDUSTRY

By creating a circuit split over bankruptcy law, and violating this Court's precedents on the appropriate role of courts in interpreting labor agreements under the RLA, the panel decision in *Continental II* undermines current collective bargaining in the airline industry. One result may be increasing instability in airline labor relations at a time when the country can least afford it.

In the wake of the events of September 11, the airline industry has entered a period of prolonged and severe financial difficulty. Several carriers face potential bankruptcy. *See, e.g.,* Air Transportation Safety and System Stabilization Act, 49 U.S.C. § 40101 note (Supp. 2002); 148

Cong. Rec. S4939-41 (daily ed. June 4, 2002) (statements of Sens. Bond, Hutchison, Allen, Snowe, Kennedy, Carnahan). Management in the post-September 11 period has been forced to consider potential merger, acquisition and/or bankruptcy options.

At the same time, the National Mediation Board has, since mid-June 2002, docketed for mediation open contract negotiations between the APA and American, between the Teamsters and Continental over their mechanics contract, between the Teamsters and Continental Micronesia over the Fleet and Passenger Service contract, between the Teamsters and Southwest Airlines over their mechanics contract and between ALPA and Mesaba Aviation, Inc. *See* "Weekly Activity Report," National Mediation Board website, *http://www.nmb.gov/activ-rpts/odarch.html* (June 21, 2002, June 28, 2002 & July 1, 2002).

By creating new uncertainty over the enforceability of successorship rights, the panel decision below "raises the bar" for unions seeking employee protections in the event of mergers and bankruptcy. The plain language of section 1113 provides that the Bankruptcy Code shall not be construed to alter labor agreements absent the bargaining mandated by section 1113. 11 U.S.C. § 1113(f). The panel decisions below alter the Agreement to nullify any right to specific performance of seniority integration, even though Continental never engaged in the prescribed bargaining. The implication for unions is that contract terms that were formerly adequate under section 1113 to protect workers, or at least guarantee bargaining, are now subject to *ad hoc* nullification by a bankruptcy judge. Unions must seek expanded protections for mergers and bankruptcy at the same time that carrier management is forced to seek flexibility in navigating those same possibilities. The potential conflict increases the chances of national disruption attendant on failed negotiations—solely because of the uncertainties created by the Third Circuit panels below.

CONCLUSION

For all the reasons set forth above, the APA respectfully requests that this Court grant *certiorari* in this matter and reverse the panel decision below.

Respectfully submitted,

DAVID PALMER DEAN *
JESSICA RACHEL ARONS
JAMES & HOFFMAN, P.C.
1101 17th Street, N.W.
Washington, D.C. 20036
(202) 496-0500

* Counsel of Record